DOCUMENT RESUME

ED 296 234 CG 020 924

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TITLE New Law Relating to Child Custody Determinations in Actions Affecting the Family (1987 Wisconsin Act 355, as Affected by 1987 Wisconsin Act 364). Information Memorandum 88-5.
INSTITUTION Wisconsin State Legislative Council, Madison.
PUB DATE 3 May 88
NOTE 29p.
PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Child Custody; Child Welfare; *Divorce; Family Problems; *Parent Child Relationship; *State Legislation
IDENTIFIERS Wisconsin

ABSTRACT

This information memorandum of the Wisconsin Legislative Council describes two pieces of state legislation: 1987 Wisconsin Act 355, which revises the laws relating to child custody determinations in actions affecting the family, and 1987 Wisconsin Act 364, which clarifies and revises the initial applicability provisions in Act 355. Part I of the memorandum presents highlights of Act 355 as affected by Act 364. Part II gives a background report on major child custody issues, including discussions of the Legislative Council's Special Committee on Custody Arrangements, definition clarifications, child custody dispute resolution procedures, the joint custody award system, the standard for change in custody, removal of child's residence, and visitation rights of nonparents. Part III contains a description of 1987 Wisconsin Act 355, as affected by 1987 Wisconsin Act 364 and includes sections on: (1) definitions; (2) joint legal custody; (3) periods of physical placement and visitation rights of nonparents; (4) additional factors in custody determinations; (5) mediation of legal custody and physical placement disputes; (6) standards for modification of legal custody and physical placement orders; (7) change of residence of legal custodian and child; (8) guardian ad litem legal education requirements and other guardian ad litem provisions; (9) access to records; (10) family court commissioner's information services; and (11) initial applicability of the acts. Statutes applicable to rebuttable presumption in the new joint legal custody law are appended. (NB)

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NEW LAW RELATING TO CHILD CUSTODY DETERMINATIONS IN ACTIONS AFFECTING THE FAMILY

(1987 WISCONSIN ACT 355, AS AFFECTED BY 1987 WISCONSIN ACT 364)

INFORMATION MEMORANDUM 88-5

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May 3, 1988

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Wisconsin Legislative Council Staff
May 3, 1988

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Information Memorandum 88-5

NEW LAW RELATING TO CHILD CUSTODY DETERMINATIONS IN ACTIONS AFFECTING THE FAMILY (1987 WISCONSIN ACT 355, AS AFFECTED BY 1987 WISCONSIN ACT 364)

INTRODUCTION

This Information Memorandum describes:

1. 1987 Wisconsin Act 355, which revises the laws relating to child custody determinations in actions affecting the family (e.g., divorce, annulment, legal separation and paternity actions).

2. 1987 Wisconsin Act 364, which clarifies and revises the initial applicability provisions in Act 355.

Both of these Acts took effect on May 3, 1988. Note, however, the discussion in Part III of this Memorandum on the effective date of: (1) the mediation provisions in Act 355; and (2) the guardian ad litem (GAL) continuing legal education requirements in Act 355.

Copies of Act 355 and Act 364 may be obtained from the Documents Room, Basement Rotunda, State Capitol, Madison, Wisconsin 53702; telephone (608) 266-2400.

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PART I

HIGHLIGHTS OF 1987 WISCONSIN ACT 355, AS AFFECTED BY 1987 WISCONSIN ACT 364

1987 Wisconsin Act 355, as affected by 1987 Wisconsin Act 364, revises the law relating to child custody determinations in divorce and other actions affecting the family. Act 355, as affected by Act 364:

1. Creates definitions of "legal custody," "sole legal custody," "joint legal custody" and "physical placement." Of particular note are the definitions of "legal custody" (the right and responsibility of a person to make major decisions concerning the child) and "physical placement" (the right to have a child physically placed with a party and the right and responsibility to make routine daily decisions regarding the child's care during that placement).

2. Permits the court to order joint legal custody if doing so is in the child's best interest and either: (a) both parties agree to joint legal custody; or (b) the parties do not agree to joint legal custody, but one party requests legal custody and the court makes specific findings relating to the suitability of the parties for joint legal custody. Prior law permitted a court to order joint custody only if the parties agreed to joint custody and if it was in the best interest of the child.

The Act does not create a presumption or a preference in favor of joint legal custody.

3. Replaces the concepts of "sole physical custody" (i.e., the physical custody rights of a parent awarded sole custody of a child) and parental "visitation rights" with a requirement that the court, in child custody actions, allocate periods of physical placement between the parents if it is in the best interest of the child.

4. Creates comprehensive provisions for mediation in actions affecting the family, including provisions:

a. Requiring all counties to have such mediation services available by June 1, 1989. The Act requires counties to either: (i) establish a family court counseling office to provide mediation; or (ii) contract with one or more public or private entities in the county or a contiguous county to provide mediation. Counties are permitted to use the mediation provisions in the Act prior to June 1, 1989.

b. Requiring that, in all actions affecting the family where it appears that a child's legal custody or physical placement is contested, the parties to the action be referred to mediation. The parties are required to attend an initial session with the mediator to determine the suitability of mediation in their action.

c. Funding mediation and child custody study services through: (i) increases in certain filing fees; and (ii) user fees. The Act sets forth alternative "user fee" structures available to a county to fund these services. No fee is to be charged for the mandatory initial mediation session (item b, above).

5. Creates new standards for modifying child custody awards, based on the type of order which is to be modified and the type of modification that is requested. In general, the modification standard under prior law (i.e., that current custodial conditions must be harmful in some way to the best interest of the child; the so-called "Millikin standard") is applied only to legal custody or substantial physical placement modifications sought within two years after the initial order was entered. Lesser standards apply to: (a) legal custody or substantial physical placement modifications after that two-year period; (b) substantial physical placement modifications where the parties have substantially equal physical placement; and (c) physical placement modifications that are not substantial.

6. Revises the law relating to removal of a child from the state by a custodial parent to: (a) make the law applicable to certain moves within the state; (b) require, if one parent objects to the move, that the parents be referred to mediation or other family court counseling services; and (c) set forth specific procedures for possible modification of the existing child custody order where the mediation or other services do not resolve the dispute over the move.

7. Extends the current law permitting the court, upon petition, to grant visitation rights to a grandparent or great-grandparent to: (a) a stepparent; and (b) any person who has maintained a relationship with a child similar to a parent-child relationship.

8. Requires that, in order to be appointed as a GAL in an action affecting the family, an attorney must have completed three hours of approved continuing legal education relating to the functions and duties of a GAL under ch. 767, Stats. This requirement, which is effective on May 1, 1989, only has to be met once.

PART II

BACKGROUND ON MAJOR CHILD CUSTODY ISSUES

A. SPECIAL COMMITTEE ON CUSTODY ARRANGEMENTS

The legislation which became Act 355 (1987 Assembly Bill 205) was developed by the Legislative Council's 1984-85 Special Committee on Custody Arrangements. The members of the Special Committee were: Representatives Jeannette Bell, Chairperson, James Rutkowski, Secretary, John C. Schober and Esther Walling; Senators Lynn S. Adelman, Vice-Chairperson, and J.M. Davis; and Public Members Gary L. Bakke, Beverly Bliss, Ph.D., Lucy Cooper, Martha L. Fineman, Kathleen M. Jeffords, Julilly W. Kohler, Dennis Larson, Mary Lou Munts, Ada Skyles, Ph.D., Kevin Van Kampen and Judge Thomas S. Williams.

The Special Committee was directed to review existing laws relating to child custody determinations in actions affecting the family. The Special Committee held 18 meetings at which issues were discussed and public testimony taken. At its final meeting, the Special Committee recommended that the Legislative Council introduce the Special Committee's proposal relating to granting legal custody, periods of physical placement and visitation rights in an action affecting the family.

The Legislative Council subsequently voted to introduce the proposal, with several minor amendments, and that proposal was introduced as 1985 Assembly Bill 474. Assembly Bill 474, as amended, was passed by both the Assembly and the Senate; but the Assembly was not able to take final floor action on Senate amendments on the last day of the final floorperiod of the 1985 Legislative Session.

Because of the continuing interest in child custody dispute issues and procedures, the Legislative Council voted to reintroduce 1985 Assembly Bill 474 in the 1987 Legislative Session. The proposal was introduced as 1987 Assembly Bill 205. That Bill, as amended by the Legislature, was enacted into law as 1987 Wisconsin Act 355. The applicability provisions in that Act were revised by 1987 Wisconsin Act 364, which took effect at the same time as Act 355.

In its study, the Special Committee determined that the most significant issues relating to child custody determinations in divorce and other actions affecting the family included: (1) definition clarification; (2) child custody dispute resolution procedures; (3) joint custody award system; (4) the standard for changing custody arrangements; (5) the removal of a child's residence; and (6) visitation rights of nonparents. Each of these issues is discussed below.

B. DEFINITION CLARIFICATION

The few definitions relating to child custody in the existing statutes were not very helpful to the court or to parents in defining the rights and responsibilities of parents after a divorce or other separation. The definitions did not clearly distinguish between: (1) the power to make major decisions concerning the child; and (2) the right and responsibility to make routine daily decisions concerning the child during the time the child is with one of the parents.

In its use of the term "visitation rights," the law reinforced the concept that a parent without legal custody of a child is merely a "visitor" in the child's life. Yet, that parent and child could have a close and continuing relationship after the divorce or separation.

C. CHILD CUSTODY DISPUTE RESOLUTION PROCEDURES

Existing law often increased the anger, polarization and "game-playing" of divorcing or separating parents by emphasizing the adversarial nature of custody determinations. Rather, the Special Committee concluded, the law should provide the parents with the information and dispute resolution mechanisms necessary for them to mentally plan for the future care of their children.

Based on public testimony, and a review of the studies and literature on the use of mediation in actions affecting the family, the Special Committee concluded that, in many cases, mediation is a more appropriate method for resolving child custody disputes than the existing adversarial process. Mediation offers the following benefits:

1. Parties may be more satisfied with the fairness of the process and the final agreement arrived at;

2. Parties are more likely to comply with a mediated agreement and less likely to engage in relitigation of the issues decided in mediation; and

3. Mediation, in many cases, reduces the costs to the parties and to the court system by efficiently resolving custody and other issues in a nonjudicial setting.

D. JOINT CUSTODY AWARD SYSTEM

Existing law encouraged the use of joint child custody as a bargaining chip by permitting one parent to veto joint custody: (1)

despite the willingness of both parents to maintain an active role in raising their children; and (2) despite the apparent ability of the parents to cooperate in the future decision-making required by an award of joint custody.

The Special Committee found that past empirical research is insufficient to warrant a presumption or a preference for joint custody in all or even some cases. However, the Special Committee noted that there is substantial research emphasizing the importance of the child's continuing contact and relationship with both parents after the parents have divorced or separated. If granted in appropriate circumstances, it was agreed that joint custody is an effective means to foster such continuing contact and relationship with both parents.

E. STANDARD FOR CHANGE IN CUSTODY

Existing law required a parent seeking a post-judgment change in a child custody order to meet very high standards before the court was permitted to change the order. Section 767.32 (2), 1985 Stats., required the party seeking a modification to show, by substantial evidence, that a change in custody is "necessary" to the best interest of the child, which has been judicially interpreted to mean that it must be shown that current custodial conditions are harmful in some way to the best interest of the child.

The Special Committee concluded that this "harm" standard effectively precluded most post-judgment changes in custody, even where such changes would be in the best interest of the child. However, the Special Committee also concluded that any standard for change of custody must also recognize the importance to the child of stability and continuity in his or her placement.

F. REMOVAL OF CHILD'S RESIDENCE

The provisions in existing law regarding change of a child's residence applied only to moves outside the state. However, a move within the state may have an equal, or more serious, effect on the noncustodial parent's exercise of visitation rights.

The Special Committee found that the removal provisions should apply to certain in-state moves which clearly may affect the rights of one of the parents to see his or her child.

G. VISITATION RIGHTS OF NONPARENTS

Existing law did not recognize the importance to the child of continuing contact with stepparents or other persons with whom the child has lived in a parent-child type relationship.

The Special Committee found that there are currently many cases in which a nonparent who has had a close, meaningful relationship with a child during the parents' marriage is denied an opportunity to even petition for visitation rights with that child after the parents are divorced or separated.

PART III

DESCRIPTION OF 1987 WISCONSIN ACT 355, AS AFFECTED BY 1987 WISCONSIN ACT 364

1987 Wisconsin Act 355, as affected by 1987 Wisconsin Act 364, makes numerous changes in the statutes governing child custody determinations in actions affecting the family (e.g., divorce, annulment, legal separation and paternity actions). In this Part, reference to "Act 355" is to the Act as affected by 1987 Wisconsin Act 364.

Major provisions in Act 355 are summarized in this Part. Act 355 itself provides more detailed information.

A. DEFINITIONS

Act 355 creates the following definitions relating to child custody in actions affecting the family:

1. "Legal custody" means, except with respect to specified decisions set forth by the court or the parties in the final judgment or order, the right and responsibility of a person to make major decisions concerning the child. "Major decisions" include, but are not limited to, decisions regarding consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for nonemergency health care, and choice of school and religion.

2. "Sole legal custody" means the condition under which one person has legal custody.

3. "Joint legal custody" means the condition under which both parents share legal custody (i.e., the right and responsibility to make major decisions) and neither parent's rights are superior, except with respect to specified decisions as set forth by the court or the parents in the final judgment or order. The Act specifies that, in making an order of joint legal custody, upon the request of one parent, the court must specify major decisions in addition to those set forth in the definition of "major decisions" in item 1, above.

4. "Physical placement" means the condition under which a parent has the right to have a child physically placed with that parent and the right and responsibility to make, during that placement, routine daily decisions regarding the child's care. The Act specifies that the routine daily decisions have to be consistent with the major decisions made by a person having legal custody.

B. JOINT LEGAL CUSTODY

Under Act 355, the court may order joint legal custody if it is in the child's best interest and if either of the following applies:

1. Both parties agree to joint legal custody. Prior law permitted a court to order joint custody only if the parties agreed to joint custody and if it was in the best interest of the child.

2. The parties do not agree to joint legal custody, but one party requests joint legal custody and the court specifically finds that:

a. Both parties are capable of performing parental duties and responsibilities and wish to have an active role in raising the child;

b. There are no existing conditions which would substantially interfere with the exercise of joint legal custody; and

c. The parties will be able to cooperate in the future decision-making required by an award of joint legal custody. The Act creates a rebuttable presumption relating to the future cooperation finding. The Act creates a rebuttable presumption that the parties will not be able to cooperate in the future decision-making required, if there is evidence that either party engaged in: (i) abuse of the child as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a), Stats.; (ii) interspousal battery as described in s. 940.19, Stats.; or (iii) domestic abuse as defined in s. 813.12 (1) (a), Stats. This presumption may be rebutted by clear and convincing evidence that the abuse will not interfere with the parties' ability to cooperate in the future decision-making required. Copies of ss. 48.981 (1) (a) and (b), 813.12 (1), 813.122 (1) (a) and 940.19, Stats., are contained in the Appendix.

The Act also gives the court some flexibility in ordering joint legal custody by permitting the court to give sole power to one of the joint legal custodians to make certain major decisions concerning the child, while both parents retain equal rights and responsibilities for other decisions. The Act also permits the court, in making an order of joint legal custody and periods of physical placement, to specify one parent as the "primary caretaker" of the child and one home as the "primary home" of the child for purposes of determining eligibility for Aid to Families with Dependent Children [s. 49.19, Stats.] or for any other purpose the court considers appropriate.

The Act specifies that, at a temporary hearing, the court or the family court commissioner (FCC) may order joint legal custody without the agreement of the other party and without the findings described above. Prior law merely stated that the court or the FCC could grant joint custody at the temporary hearing; this provision resulted in confusion as to whether the law permitted such an award where the parties did not agree to joint custody.

C. PERIODS OF PHYSICAL PLACEMENT; VISITATION RIGHTS OF NONPARENTS

Act 355 replaces the current concepts of "sole physical custody" (i.e., the physical custody rights of a parent awarded sole custody of a child) and parental "visitation rights" with a requirement that the court, in child custody actions, allocate periods of physical placement between the parents if in the best interest of the child. The Act requires the court, whenever it orders sole or joint legal custody to parents, to allocate periods of physical placement between the parents.

The Act specifies that a child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health. This is in keeping with the standard under prior law for denying visitation rights to a parent. Also, as under prior visitation law, the Act provides that periods of physical placement may not be denied for failure to meet, or granted for meeting, financial obligations to the child or the former spouse.

With reference to visitation rights of nonparents, the Act extends the current statutory provision on visitation by grandparents or great-grandparents by permitting the court, upon petition, to also grant visitation rights to a stepparent and to any person who has maintained a parent-child relationship with a child. [Current law, allowing visitation rights to a grandparent or great-grandparent, is not disturbed.]

D. ADDITIONAL FACTORS IN CUSTODY DETERMINATIONS

Act 355 creates the following additional factors the court must consider in making a legal custody or physical placement determination:

1. Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party;

2. Whether there is evidence that a party engaged in abuse of the child, as defined in s. 48.981 (1) (a) and (b) or 813.122 (1) (a), Stats.;

3. Whether there is evidence of interspousal battery, as described under s. 940.19, Stats., or domestic abuse, as defined in s. 813.12 (1), Stats.; and

4. Whether either party has or had a significant problem with alcohol or drug abuse.

In addition, the Act codifies current case law that child custody determinations may not be made on the basis of race.

E. MEDIATION OF LEGAL CUSTODY AND PHYSICAL PLACEMENT DISPUTES

1. Definition of "Mediation"

Act 355 defines "mediation" to mean a cooperative process involving the parties and a mediator, the purpose of which is to aid the parties, by application of communication and dispute resolution skills, in defining and resolving their own disagreements, with the best interest of the child as the paramount consideration.

2. Availability of Mediation Services in All Counties

Act 355 requires all counties to make mediation services available either by: (a) establishing a family court counseling office to provide mediation services; or (b) contracting with one or more public or private agencies in the county or a contiguous county to provide these services.

If the family court counseling office option is selected, the Act: (a) permits two or more contiguous counties to enter into a cooperative agreement for a single office to provide mediation services in the cooperating counties; and (b) permits the county (or counties, if a cooperative agreement is entered into) to direct that legal custody or physical placement studies also be provided by the office.

3. Director of Family Court Counseling Services

Act 355 requires the circuit judges for each county (or counties, if a cooperative agreement is entered into), with the approval of the chief judge of the judicial administrative district, to designate a director of family court counseling services. The director must be a qualified mediator and has general administrative responsibilities for the operation of the counseling office, if any, and provision of mediation and related services. The Act specifies that a county may designate an FCC as the director of family court counseling services.

4. Qualifications of Mediators

Act 355 requires that persons conducting mediation under a county program have not less than 25 hours of mediation training or at least three years of professional experience in dispute resolution.

5. Powers and Duties of Mediator

Act 355 specifies that a mediator must be guided by the best interest of the child in performing mediation duties. A mediator under a county program may, among other things: (a) include the attorney for any party or any appointed GAL in the mediation; (b) interview any child of the parties, with or without a party present; and (c) suspend mediation when necessary to enable a party to obtain an appropriate court order or appropriate therapy.

6. Referral to Mediation; Initial Session Required

Act 355 requires the court or the FCC to refer the parties to mediation, in all actions affecting the family where it appears that legal custody or physical placement is contested. The parties are required to attend an initial session with the mediator. This mandatory initial session, for which no fee is to be charged, is a screening and evaluation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation.

The Act also permits the FCC to refer persons to mediation or other appropriate counseling service if: (a) the parties wish to have joint legal custody, but need assistance in resolving problems relating to joint legal custody or physical placement, or both; or (b) a person with physical placement rights, a child of such a person, a person with visitation rights or any person with physical custody of a child is experiencing difficulty in the exercise of these rights.

The Act permits the parties, at their own expense, to receive mediation services from a private mediator.

7. When Initial Mediation Session Is Not Required

Act 355 does not require attendance at an initial mediation session if the court finds that attending the session would cause "undue hardship" or would endanger the health or safety of one of the parties. In making its determination of whether attendance at the session would endanger the health or safety of one of the parties, the court is required to consider

evidence of child abuse, domestic abuse or significant current problems with alcohol or drug abuse or any other evidence indicating that a party's health or safety will be endangered by attending the session.

8. Termination of Mediation

Act 355 permits a mediator to terminate mediation if a party does not cooperate or if mediation is not appropriate. In addition to these grounds for termination, the Act permits the mediator to terminate mediation, if there is evidence of child abuse, domestic abuse or significant current problems with alcohol or drug abuse or any other evidence which indicates one of the parties' health or safety will be endangered if mediation is not terminated.

9. Mediation Procedure

Act 355 establishes the following mediation procedure:

a. Unless the parties contract with a private mediator at their own expense, the director of the counseling service must assign a mediator to the case. If a private mediator is used, the parties must sign and file with the director and the court or FCC, a written notice to that effect.

b. Issues of property division, maintenance and child support may not be considered in county-provided mediation unless: (i) such issues are directly related to the legal custody or physical placement issues being considered; and (ii) the parties agree, in writing, to consider them.

c. Subject to item d, below, if agreement is reached in mediation, the agreement must be prepared in writing and submitted to the court as a stipulation for inclusion in a court order. The court may only approve or reject the agreement, not modify it. The court must state in writing its reasons for rejecting an agreement.

d. Prior to submitting the agreement to the court: (i) the agreement must be reviewed by the attorney, if any, for each party and by the GAL, if one has been appointed; (ii) the reviewing attorney or attorneys and the GAL must certify in writing on the agreement that they have reviewed the agreement and the GAL must comment on the agreement based on the best interest of the child; and (iii) the mediator must certify that the agreement is in the best interest of the child.

e. If agreement is not reached in mediation, the court must be notified, a GAL must be promptly appointed, the matter must be referred

for a legal custody or physical placement study, if appropriate, and the issues must be resolved by usual judicial procedures.

10. Confidentiality; Privilege

Act 355 creates a confidentiality requirement for any materials made, used or received by a mediator during the course of mediation. Such material is not a public record and, with certain exceptions, is not subject to discovery or admission in any action.

The Act also creates a privilege under the evidence code permitting, with certain exceptions (e.g., if both mediation parties consent to waive the privilege; if a mediator reports child abuse under s. 48.981, Stats.), parties to mediation to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made in the mediation.

11. Confidentiality; Mediator as Custody Study Investigator

Under Act 355, a person who provided mediation to the parties is not permitted to investigate the parties in a subsequent legal custody or physical placement study unless each party personally consents, by stipulation, to that activity. If the parties do consent, the privilege for confidential communications in the mediation is waived. The Act specifies that:

a. The court or the FCC must inform the parties that there is no privilege of confidentiality when the mediator also conducts the legal custody or physical placement study.

b. The parties, before consenting to this activity by the mediator, must receive notice from the mediator that consent waives that privilege of confidentiality.

12. Legal Custody and Physical Placement Studies

Act 355 creates a specific statutory provision requiring a county or two or more contiguous counties to provide legal custody and physical placement study services. Under the Act, whenever legal custody or physical placement of a minor child is contested and mediation is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, the court may order a person or entity designated by the county to investigate: (a) the conditions of the child's home; (b) each party's performance of parental duties and

responsibilities relating to the child; and (c) any other matter relevant to the best interest of the child.

The person or entity investigating the parties must make the results available to both parties. The report is a part of the record in the action unless the court orders otherwise.

No person who provided mediation to the parties may investigate the parties under this provision, unless each party personally so consents by stipulation.

13. Funding of Mediation and Study Services

Act 355 funds county-provided mediation services and custody studies by: (a) a $20 increase in the filing fee in actions affecting the family; (b) a $25 increase in the fee for a post-judgment motion to modify a legal custody or physical placement order; and (c) creation of a "user fee."

The county has two user fee alternatives, either: (a) a single flat fee of $100 for mediation and $300 for studies, no matter how many services are provided; or (b) a county-established "sliding scale" fee schedule which is based on the parties' ability to pay and which takes into account the additional fees provided under the Act. Fees paid by the parties must be based on the services actually used.

Whichever user fee the county utilizes, the county must provide the services regardless of the parties' ability to pay. If either or both parties are unable to pay the fees, the court is required to grant a judgment, separate from the judgment in the action affecting the family, for the amount of the fees in favor of the county and against the party or parties responsible for the fees.

As noted in item 6, above, no fee is to be charged for the mandatory initial mediation session.

14. Applicability of Mediation Provisions to Counties

Under Act 355, the requirement for county provision of mediation services applies to each county on the date established by that county, or approximately one year (the first day of the 13th month) after the Act's effective date, whichever is earlier. Many counties may not be able to immediately comply with the Act's provisions relating to mediation services. The Act provides for a 12-month period during which a county (or counties, if there is a cooperative agreement for a family court counseling office) may use the mediation provisions in the Act, if the

requirements are met. All counties are required to comply with the mediation provisions on and after the first day of the 13th month following publication (i.e., on and after June 1, 1989).

F. STANDARDS FOR MODIFICATION OF LEGAL CUSTODY AND PHYSICAL PLACEMENT ORDERS

Act 355 replaces the prior standard for modifying child custody awards with new standards. [NOTE: If the child is being moved outside the state or a distance of 150 miles or more from the other parent within the state, the provisions discussed in Section G, below, apply to the move.] The Act specifies that a request for a modification may be brought by petition, motion or order to show cause.

Prior law [s. 767.32 (2), 1985 Stats.] required the party seeking the modification to show, by substantial evidence, that a change in custody is necessary to the best interest of the child. In Millikin v. Millikin, 115 Wis. 2d 16, 23-24 (1983), the Wisconsin Supreme Court interpreted the term "necessary" in that statute to mean that "the current custodial conditions are harmful in some way to the best interest of the child" (emphasis added).

1. Contested Legal Custody Modifications

a. Within two years after the initial order: A court is not permitted to modify a legal custody order within the two-year period after the initial legal custody order is entered under s. 767.24, Stats. (e.g., the final order in an original divorce or legal separation action), unless a party seeking the modification shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child (i.e., comparable to the current Millikin standard).

b. After two-year period: After the two-year period in item a, above, a court may modify an order of legal custody if the court finds that: (i) the modification is in the best interest of the child; and (ii) there has been a substantial change of circumstances since the entry of the last order affecting legal custody.

With respect to this standard, there is a rebuttable presumption that continuing the current allocation of decision-making under a legal custody order is in the best interest of the child. The Act also specifies that a change in the economic circumstances or marital status of either party is not sufficient to meet this standard.

2. Contested Physical Placement Modifications

a. Substantial modifications within two years after the initial order: In general, a court is not permitted to order substantial physical placement modifications within the two-year period after the initial placement order is entered under s. 767.24, Stats., unless the party seeking the modification meets a standard comparable to the Millikin standard. Under the Act, a substantial physical placement modification is a modification which would substantially alter the time a parent may spend with his or her child. The Act specifies that the court may order such a substantial modification within the two-year period only if the party seeking the modification shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child.

However, if the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, a court may order a substantial physical placement modification, within the two-year period, if it is in the best interest of the child. If no such circumstances exist, the court may order such a modification only if the "harm" standard, described above, is met.

b. Substantial modifications after two-year period: In general, after the two-year period in item a, a court may modify an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds that:

> (i) The modification is in the best interest of the child; and
>
> (ii) There has been a substantial change of circumstances since the entry of the last order substantially affecting physical placement.

With respect to this standard, there is a rebuttable presumption that continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. The Act also specifies that a change in the economic circumstances or marital status of either party is not sufficient to meet this standard.

If the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, a court may order a substantial physical placement modification if it is in the best interest of the child. If no such circumstances exist, the court

may order such a modification only if the "substantial change of circumstances" standard, described above, is met. However, the rebuttable presumption applicable to the standard is that having substantially equal periods of physical placement is in the best interest of the child.

c. Minor physical placement modifications: A court may, at any time, modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child (i.e., a change comparable to a minor change in visitation rights under prior law) if the court finds that the modification is in the best interest of the child.

3. Denial of Physical Placement

Upon petition, motion or order to show cause by a party or its own motion, a court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health.

4. Stipulated Legal Custody or Physical Placement Modifications

Act 355 specifies that if, after an initial custody order is entered under s. 767.24, Stats., the parties agree to a modification in an order of physical placement or legal custody, and file a stipulation with the court that specifies the agreed-upon modification, the court must incorporate the terms of the stipulation into a revised order of legal custody or physical placement.

G. CHANGE OF RESIDENCE OF LEGAL CUSTODIAN AND CHILD

Under prior law, a custodial parent had to give 60 days' notice, to a parent with visitation rights, of the custodian's intention to establish legal residence outside the state or to remove the child from the state for more than 90 days. Upon motion by the parent with visitation rights and a finding by the court that the move was against the best interest of the child, the court could have denied permission to the custodian to remove the child.

Act 355 creates the following new procedures applicable when a child is being moved outside the state or a distance of 150 miles or more from the other parent within the state:

1. Notice to Other Parent

If the court grants periods of physical placement to more than one parent, it must order a parent with legal custody of and physical placement rights to a child to provide not less than 60 days written notice to the other parent, with a copy to the court, of his or her intent to:

a. Establish his or her legal residence outside the state and remove the child from the state for a period of time exceeding 90 consecutive days; or

b. Establish his or her legal residence and remove the child, within this state, at a distance of 150 miles or more from the other parent.

The parent must send the notice by certified mail. The notice must state the parent's proposed action and that the other parent may object within the time specified in item 2, below.

2. Objection to Move; Mediation

Within 15 days after receiving the notice, the other parent may send to the parent, with a copy to the court, a written notice of objection to the proposed action. The court or FCC is required to promptly refer the parents for mediation or other family court counseling services and may appoint a GAL. Unless the parents agree to extend the time period, if mediation or counseling services do not resolve the dispute within 30 days after referral, the matter proceeds under items 3 to 5, below.

3. Court Proceedings Where Move Is Contested

If the parent proposing the move has sole legal or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may then modify the legal custody or physical placement order, if the court finds that:

a. The modification is in the best interest of the child; and

b. The move will result in a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

With respect to these proceedings, there is a rebuttable presumption that it is in the best interest of the child to continue the current allocation of decision-making under a legal custody order and to continue the child's current placement with the parent with whom the child resides for the greater period of time. In addition, the Act specifies that a change in the economic circumstances or marital status of either party is not a sufficient basis for modification of the legal custody or physical placement order.

The burden of proof in these proceedings is on the parent objecting to the move.

If the parents have joint legal custody and have substantially equal periods of physical placement with a child, either parent may file a petition, motion or order to show cause for modification of the legal custody or physical placement order if the child is going to be moved. The court may modify the legal custody or physical placement order, if the court finds that:

a. Circumstances make it impractical for the parties to continue to have substantially equal periods of physical placement; and

b. The modification is in the best interest of the child.

The burden of proof in these proceedings is on the parent filing the petition, motion or order to show cause.

4. Guardian Ad Litem; Prompt Hearing

After a petition, motion or order to show cause is filed when a move is contested, under item 3, above, the court must appoint a GAL and hold a hearing as soon as possible.

5. Factors in Court's Determination

In making its determination for a modification in the legal custody or physical placement order when a move is contested, under item 3, above, the court must consider all of the following factors:

a. Whether the purpose of the proposed action is reasonable.

b. The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

c. The availability of alternative arrangements which would foster and continue the child's relationship with and access to the other parent.

6. Notice Required for Removals of 14 Days or More

Unless the parents agree otherwise, a parent with legal custody and physical placement rights must notify the other parent before removing the child from his or her "primary residence" for a period of not less than 14 days. The term "primary residence" is not defined in the Act. If the removal comes within the provisions of items 1 to 5, above, those provisions take the place of this simple notice requirement.

7. Withholding Child Support Payments Not Permitted

Act 355 deletes a provision in prior law which permitted the court, in the case of removal of a child from the state contrary to a court order, to order that a portion of any child support payments owed by the parent whose visitation rights were violated by the removal be withheld to defray the expense to that parent of exercising his or her rights.

H. GUARDIAN AD LITEM LEGAL EDUCATION REQUIREMENTS; OTHER GUARDIAN AD LITEM PROVISIONS

Act 355 specifies that, in order to be appointed as a GAL in an action affecting the family, an attorney must have completed three hours of approved continuing legal education relating to the functions and duties of a GAL under ch. 767. This requirement only has to be met once. The effective date of this requirement is the first day of the 12th month after the effective date of the Act (i.e., May 1, 1989). Under current law, with one minor exception in certain probate actions, in all matters in which a GAL is appointed by the court, the GAL must be an attorney admitted to practice in this state [s. 757.48 (1), Stats.].

With reference to GAL's, the Act also:

1. Permits the GAL or another appropriate professional to communicate to the court the wishes of the child as to his or her legal custody or physical placement. Some courts interpreted the prior law to require the child to communicate his or her wishes to the court.

2. Permits the GAL to move the court for an order requiring the parties or, if they cannot pay, the county to pay for expert witnesses to assist the GAL in performing his or her duties. The GAL must show that use of experts is necessary.

3. Permits the court, if the county has paid GAL fees, to grant a separate judgment for the amount the county seeks from the parties for reimbursement of those fees.

I. ACCESS TO RECORDS

Act 355 permits a parent who does not have legal custody of a minor child to have access to medical, dental and school records pertaining to the child unless prohibited by law. However, the Act specifies that a parent who has been denied periods of physical placement with a child does not have a right of access to: (1) the child's school records; (2) a child's court or treatment records under ch. 51, Stats. (Mental Health Act); (3) a child's records under ch. 55, Stats. (Protective Service System); and (4) a child's patient health care records under s. 146.82 or 146.83, Stats.

J. FAMILY COURT COMMISSIONER'S INFORMATION SERVICES

Act 355 repeals current requirements that: (1) the FCC inform parties in divorce and legal separation actions of the availability of counseling and referral services; and (2) divorce and legal separation actions may not be brought to trial until one of the parties has participated in such counseling.

Instead, the Act requires the FCC to: (1) inform the parties of available services, including referral services, offered by the FCC and by the director of family court counseling services; (2) provide to a party, upon request and with or without charge, written information on the procedures involved in the party's action or proceeding and any services available to assist the parties; and (3) provide to a party, for inspection or purchase, a copy of the statutory provisions in ch. 767, Stats., generally pertinent to the party's action.

K. INITIAL APPLICABILITY

The following provisions are found in 1987 Wisconsin Act 364, which clarifies and revises the initial applicability provisions in 1987 Wisconsin Act 355. Both of these Acts took effect on May 3, 1988.

1. New Actions; Modifications of Orders

Act 364 specifies that the provisions of Act 355 apply to:

a. Any action commenced on or after May 3, 1988.

b. Any petition, motion or order to show cause for modification of a legal custody or physical placement order or for moving a child's residence within or outside the state, filed on or after May 3, 1988. The petition, motion or order to show cause may be for a modification of an order entered: (i) prior to May 3, 1988; or (ii) on or after May 3, 1988. For example, if a parent files a motion for modification of a 1985 child custody order, the provisions in Act 355 apply to the adjudication of that modification request.

2. Pending Actions

If the parties agree, certain provisions in Act 355 also apply to actions and proceedings pending on May 3, 1988. Notwithstanding the applicability provisions described in item 1, above, the parties may agree, in actions or proceedings pending on May 3, 1988, to have any of the following orders adjudicated under the Act:

a. A legal custody or physical placement order at a temporary hearing in an action affecting the family may be adjudicated under s. 767.23, Stats., as affected by the Act.

b. A final legal custody or physical placement order in an action affecting the family may be adjudicated under s. 767.24, Stats., as affected by the Act. This provision permits, for example, parties who are seeking joint custody in pending actions to agree to adjudication under revised s. 767.24, Stats., which contains specific definitions and other provisions relating to joint legal custody and periods of physical placement not found in prior law.

c. An order modifying a legal custody or physical placement order in modification proceedings may be adjudicated under s. 767.325, Stats., created in the Act.

d. An order modifying a legal custody or physical placement order in proceedings relating to moving a child outside the state may be adjudicated under s. 767.327, Stats., created in the Act.

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APPENDIX

STATUTES APPLICABLE TO REBUTTABLE PRESUMPTION IN THE NEW JOINT LEGAL CUSTODY LAW

STATUTES APPLICABLE TO REBUTTABLE PRESUMPTION IN THE NEW JOINT LEGAL CUSTODY LAW

ABUSE OF THE CHILD [s. 48.981 (1) (a) and (b); s. 813.122 (1) (a)]

48.981 (1) (a) "Abuse" means any of the following:

1. Physical injury inflicted on a child by other than accidental means.

2. Sexual intercourse or sexual contact under s. 940.225 or 948.02.

3. A violation of s. 948.05.

4. Permitting, allowing or encouraging a child to violate s. 944.30.

5. Emotional damage.

6. A violation of s. 940.227.

(b) "Child" means any person under 18 years of age.

813.122 (1) (a) "Abuse" means any of the following:

1. Physical injury inflicted on a child by other than accidental means.

2. Sexual intercourse or sexual contact under s. 940.225 or 948.02.

3. A violation of s. 948.05.

4. Permitting or requiring a child to violate s. 944.30.

5. Emotional damage.

6. A threat to engage in any conduct under subds. 1 to 5.

INTERSPOUSAL BATTERY [s. 940.19]

940.19 BATTERY; AGGRAVATED BATTERY. (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

(1m) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class E felony.

(2) Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another with or without the consent of the person so harmed is guilty of a Class C felony.

(3) Whoever intentionally causes bodily harm to another by conduct which creates a high probability of great bodily harm is guilty of a Class E felony. A rebuttable presumption of conduct creating a high probability of great bodily harm arises:

(a) If the person harmed is 62 years of age or older; or

(b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, which is discernible by an ordinary person viewing the physically disabled person.

DOMESTIC ABUSE [s. 813.12 (1) (a)]

813.12 (1) (a) "Domestic abuse" means any of the following engaged in by an adult family member or household member against another adult family member or household member:

1. Intentional infliction of physical pain, physical injury or illness.

2. Intentional impairment of physical condition.

3. A violation of s. 940.225 (1), (2) or (3).

4. A threat to engage in the conduct under subd. 1, 2 or 3.